Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-144

UNITED FEDERATION OF TEACHERS WELFARE FUND,

Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaint of PAULA FOSTER,

Appellees,

and

PAULA FOSTER,

Intervenor.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Department

MOTION TO DISMISS

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Restatement of Questions Presented

1. Can this Court assert jurisdiction over an appeal pursuant to 28 U.S.C. § 1257(2) from an order of the Appellate Division amendatory of an earlier order adjudging appellant in civil contempt and providing appellant means to purge itself?

2. Does the appeal warrant reconsideration by this Court of the question whether the Employee Retirement Income Security Act of 1974* supersedes or preempts application of State fair employment legislation to employee benefit plans?

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* 88 Stat. 832, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-144

UNITED FEDERATION OF TEACHERS WELFARE FUND,
Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the complaint of PAULA FOSTER,
Appellees,

and

PAULA FOSTER,
Intervenor.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Department

MOTION TO DISMISS

Appellee State Division of Human Rights moves the Court to dismiss this appeal. The grounds for this motion are (1) the order on appeal* is not reviewable under 28

* Contrary to statements by appellant, see Jurisdictional Statement at 2, this appeal is from the order of the Appellate Division dated December 18, 1979, set forth in Jurisdictional Statement at 5a, not from the order dismissing appellant's motion for leave to appeal to the New York Court of Appeals.

U.S.C. § 1257(2); (2) this Court has adjudged insubstantial the Federal question appellant seeks to raise.*

Statutes Involved

1. 28 U.S.C. § 1257(2) provides in relevant part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "...
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. The provisions of the Human Rights Law** relevant to the question appellant seeks to raise are set forth in the Jurisdictional Statement at 19a.

3. The supersedure clause of ERISA, 29 U.S.C. § 1144, is set forth in the Jurisdictional Statement at 20a ff.

Statement of the Case

The order on appeal to this Court was made and entered December 18, 1979 by the Appellate Division in a proceeding brought by this appellee to adjudge appellant in civil contempt for disobedience to an order of the Appellate

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* *Minnesota Mining & Mfg. Co.* v. *Minnesota*, —— U.S. ——, 62 L.Ed2d 726 (1980); *Mountain States Telephone & Telegraph Co.* v. *Commissioner of Labor, Montana*, —— U.S. ——, 63 L.Ed.2d 754 (1980).

** N.Y. Executive Law § 296.1(a) (McKinney's 1972).

Division dated June 5, 1979* enforcing administrative orders** finding appellant in violation of the Human Rights Law. On August 2, 1979 the Appellate Division held appellant in contempt and specified the conditions under which it might purge itself.† In its order dated December 18, 1979, the court amended the adjudication of contempt to direct that compliance by appellant with the administrative orders be retroactive to the date of issuance, and to allow additional time for such compliance. Appellant's motion for leave to appeal from that order was dismissed for nonfinality of the order on April 29, 1980.

ARGUMENT

I.

The order on appeal is not reviewable by this Court.

The order of December 18, 1979 neither constitutes the final judgment of the highest court of New York in which a decision could be had nor presents a Federal question. *Cf.* 28 U.S.C. § 1257(2). This Court could not review it even if appellant sought certiorari rather than review by appeal.

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* The order of June 5, 1979, set forth in Cross-Appendix hereto at A1, supplemented an order of enforcement entered July 6, 1978, in *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board,* 64 App. Div.2d 514 (1st Dept.), *appeal denied,* 46 N.Y.2d 706 (1978). See Jurisdictional Statement at 6a.

** For the text of these orders, see Jurisdictional Statement at 7a-16a.

†The text of the order dated August 2, 1979 is set forth in Cross-Appendix hereto at A3.

A. *Nonfinality.* The order does not meet the criteria of finality. See generally 12 *Moore's Federal Practice* ¶ 508.01 (2nd ed. 1980). It does not effectively determine the litigation. There will remain to be decided the question whether appellant has complied with the orders enforcing the administrative orders under the Human Rights Law, or has purged itself of contempt.

The order does not fit within the four exceptions to the finality rule articulated by this Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). All those exceptions presuppose a final decision of a Federal question. The order on appeal decides no Federal question at all. See *infra* at 5.

A determination holding a party in civil contempt is not a final order. 9 *Moore's Federal Practice* ¶ 110.13[4]. It follows that an order amendatory of such a determination is not a final order.

B. *Not highest court.* The order of December 18, 1979 was not rendered by the highest court of New York in which a decision could be had. Although appellant sought review by the New York Court of Appeals, appellant invoked, unsuccessfully, only the jurisdiction of that Court over final orders. By failing to invoke CPLR § 5602(a)(2), providing pursuant to N.Y. Const. Art. VI § 3(5) appeal by permission from a nonfinal order of the Appellate Division in a proceeding instituted by or against an administrative agency, by choosing instead a route resulting in dismissal of its motion for leave to appeal, appellant now fails to bring to this Court a judgment of the highest court in which a decision could be had. See *Gotthilf* v. *Sills,* 375 U.S. 79 (1963).

C. *Dearth of Federal question.* A State court's adjudication holding in civil contempt a party disobedient to its order may raise questions of State law, see N.Y. Judiciary Law § 753.A.3, but does not encompass Federal or other questions presented by the underlying order. 9 *Moore's Federal Practice* ¶ 110.13[4] at 165, 168-9. The orders of the Appellate Division which enforced the administrative orders under the Human Rights Law presented a question as to supersedure of that law by ERISA,* but that question is not in issue in the subsequent proceeding for contempt. It is now too late to seek review in this Court of the orders of enforcement. The ninety-day period prescribed in 28 U.S.C. § 2101(c) cannot be circumvented by raising the question at this time. See *Hill* v. *Chicago & Evanston R.R. Co.*, 140 U.S. 52 (1891). In any event, the order of December 18, 1979 rests on an adequate and independent State ground.

II.

This Court has adjudged insubstantial the Federal question appellant seeks to raise.

Appellant argues in essence that the order of December 18, 1979 answers implicitly a question as to the validity of the Human Rights Law in the face of ERISA and the Supremacy Clause. The Division, having pointed out the dearth of any Federal question in the proceedings below,

* That question was in issue also in *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 53 App. Div.2d 808 (1st Dept. 1976), *appeal denied*, 40 N.Y.2d 809 (1977); *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 59 App. Div.2d 826 (1st Dept. 1977), *appeal denied*, 44 N.Y. 2d 641, *cert. denied*, 439 U.S. 834 (1978).

supra at 5, argues further that the question articulated by appellant has been ruled insubstantial. *Minnesota Mining & Mfg. Co.* v. *Minnesota, supra; Mountain States Telephone & Telegraph Co.* v. *Commissioner of Labor, Montana, supra.* In each case, the State's highest court had upheld the State's fair employment statute against claims of supersedure and preemption by ERISA. Appeals to this Court were summarily dismissed for want of a substantial Federal question.

Although such summary dismissal does not preclude subsequent consideration by this Court of the same issue, see *Washington* v. *Yakima Indian Nation,* 439 U.S. 463, 477 n.20 (1979) and cases cited; see also *Caban* v. *Mohammed,* 441 U.S. 380, 390 n.9 (1979), appellant has failed to show such consideration to be justified. Given the nonfinality of the order here sought to be reviewed, its issuance by a court not the highest in which a decision could be had, and its adequate and independent basis in State law, this case makes an inappropriate vehicle even should this Court wish to give plenary consideration to a question so recently, albeit summarily, decided.

Conclusion

The order of the Appellate Division dated December 18, 1979 is not reviewable by this Court, and appellant has not raised a substantial Federal question which this Court can now properly decide.

The appeal should be dismissed.

Dated: New York, N.Y.
August 28, 1980

Respectfully submitted,

ANN THACHER ANDERSON
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State Division of Human Rights
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New York, N.Y. 10047
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State Division of Human Rights

APPENDIX

Cross-Appendix

Order of Appellate Division Dated June 5, 1979

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of June, 1979

Present:

HON. HAROLD BIRNS, Justice Presiding,
LEONARD H. SANDLER
MYLES J. LANE
PAUL J. YESAWICH, JR., Justices.

M-1290

New York County No. 79-04767

UNITED FEDERATION OF TEACHERS WELFARE FUND,
Petitioner,

against

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the Complaint of PAULA FOSTER,
Respondents,

and

PAULA FOSTER,
Respondent-Intervenor.

Respondent-Intervenor, having moved this Court for an order directing the Clerk of the Court of New York County

to enter a judgment and the motion having come on to be heard;

AND, upon reading and filing the notice of motion dated March 20, 1979; the supporting affidavit of James J. Foster, dated March 21, 1979; the answering affidavit of Jeffrey L. Kreisberg, dated April 2, 1979; and due deliberation having been had thereon; and the memorandum decision of this court having been rendered on May 15, 1979, it is

ORDERED that:

(1) the determination of the State Human Rights Appeal Board dated February 21, 1978 be confirmed;

(2) the petition be dismissed; and

(3) judgment be entered against petitioner United Federation of Teachers Welfare Fund and for respondent-intervenor Paula Foster for:

(a) $50 plus interest from June 25, 1976;

(b) $1300 plus interest from May 15, 1974;

(c) for covered dental expenses, $195 plus interest from June 25, 1976.

(4) the clerk of New York County is directed to enter judgment accordingly.

ENTER,

LEONARD H. SANDLER
Justice

Order of Appellate Division Dated August 2, 1979

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 2, 1979

Present: Hon. Francis T. Murphy, Jr., Presiding Justice

Arnold L. Fein
Joseph P. Sullivan
Max Bloom
David Ross Justices

M-2674

United Federation of Teachers Welfare Fund and United Federation of Teachers, AFL-CIO,

Petitioners,

against

State Human Rights Appeal Board and State Division of Human Rights on the Complaint of Paula Foster,

Respondents,

and

Paula Foster,

Respondent-Intervenor.

The above-named respondent State Division of Human Rights and respondent-intervenor Paula Foster having moved this Court for an order holding petitioner United

Federation of Teachers Welfare Fund in contempt of court for its refusal to comply with the order of this Court entered on June 5, 1979,

Now, upon reading and filing the notice of motion, with proof of due service and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is granted. Petitioner United Federation of Teachers Welfare Fund may purge itself of said contempt by complying with the aforesaid order of this Court entered on June 5, 1979 within 20 days of service of a certified copy of this order with notice of entry.

ENTER:

FRANCIS X. GALDI
Deputy Clerk.